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No. 83-2161

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1983

STATE OF MONTANA, et al.,
Petitioners,

v.

BLACKFEET TRIBE OF INDIANS,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONERS

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QUESTION PRESENTED FOR REVIEW

Is the provision of the 1924 Indian Mineral Leasing Act, 25 U.S.C. §398 (1976), authorizing state taxation of oil and gas production on tribal lands applicable to leases made after the enactment of the 1938 Indian Mineral Leasing Act, 25 U.S.C. §§396a-396g (1976)?

PARTIES TO THE PROCEEDING

The Petitioners are the State of Montana, the Director of the Montana Department of Revenue, Glacier County, Montana, and Pondera County, Montana.[1] The Respondent is the Blackfeet Tribe of Indians. All parties here were parties to the proceeding in the Ninth Circuit Court of Appeals.

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1 The Petitioners are collectively called "the State." Statements pertaining only to the Petitioner counties are noted.

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OPINIONS BELOW

A three-judge panel of the Ninth Circuit Court of Appeals issued its original opinion on December 14, 1982. That unreported opinion is reproduced in the Appendix to the Petition for Certiorari (Pet. App. 70). On June 22, 1983, the Ninth Circuit ordered that the case be reheard en banc. 709 F.2d 521.

The en banc panel issued its opinion on April 3, 1984. That opinion is reported at 729 F.2d 1192 (9th Cir. 1984), and appears at Pet. App. 1. In this brief, all references to the opinion of the Ninth Circuit Court of Appeals are to this April 3, 1984, opinion. The opinion of the United States District Court for the District of Montana, issued by Judge Hatfield, 507 F. Supp. 446 (D. Mont. 1981), appears at Pet. App. 103.

JURISDICTION

The opinion of the en banc panel of the Court of Appeals for the Ninth Circuit was entered on April 3, 1984. The petition for a writ of certiorari was timely filed with this Court on June 29, 1984. This Court granted certiorari on October 1, 1984. The jurisdiction of

this Court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

1. Federal Statutes.

The Act of February 28, 1891, 26 Stat. 795, codified at 25 U.S.C. §397 (Pet. App. 150).

The Act of June 30, 1919, 41 Stat. 3, 16, & 17, which provides in pertinent part as follows:

> ...the Secretary of the Interior is authorized to make allotments under existing laws within the said [Blackfeet] Reservation to any Indians of said Blackfeet Tribe not heretofore allotted....
>
> Provided further, That any and all minerals, including coal, oil, and gas, are hereby reserved for the benefit of the Blackfeet Tribe of Indians until Congress shall otherwise direct, and patents hereafter issued shall contain a reservation accordingly:
>
> Provided, That the lands containing said minerals may be

> leased under such terms and conditions as the Secretary of the Interior may prescribe.

Section 26 of the Act of June 30, 1919, 41 Stat. 31, which provides in pertinent part as follows:

> That the Secretary of the Interior be, and hereby is, authorized and empowered, under general regulations to be fixed by him and under such terms and conditions as he may prescribe, not inconsistent with the terms of this section, to lease to citizens of the United States or to any association of such persons or to any corporation organized under the laws of the United States or of any State or Territory thereof, any part of the unallotted lands within any Indian reservation within the States of Arizona, California, Idaho, Montana, Nevada, New Mexico, Oregon, Washington, or Wyoming, heretofore withdrawn from entry under the mining laws for the purpose of mining for deposits of gold, silver, copper, and other valuable metalliferous minerals, which leases shall be irrevocable except as herein provided, but which may be declared null and void upon breach of any of their terms.

> That after the passage and approval of this section, unallotted lands, or such portion thereof as the Secretary of the Interior shall determine, within Indian reservations heretofore withheld from disposition under the mining laws may be declared by the Secretary of the Interior to be subject to exploration for the discovery of deposits of gold, silver, copper, and other valuable metalliferous minerals by citizens of the United States, and after such declaration mining claims may be located by such citizens in the same manner as mining claims are located under the mining laws of the United States...

The Act of May 29, 1924, 43 Stat. 244, codified at 25 U.S.C. §398 (Pet. App. 152), which provides in pertinent part:

> Provided, That the production of oil and gas and other minerals on such lands may be taxed by the State in which said lands are located in all respects the same as production on unrestricted lands, and the Secretary of the Interior is hereby authorized and directed to cause to be paid the tax so

assessed against the royalty interests on said lands:

Provided, however, That such tax shall not become a lien or charge of any kind or character against the land or the property of the Indian owner.

The Indian Reorganization Act of June 18, 1934, 48 Stat. 984, codified as amended at 25 U.S.C. §§461-479 (Pet. App. 154).

The Act of May 11, 1938, 52 Stat. 347, codified as amended at 25 U.S.C. §§396a-396g (Pet. App. 175). Section 7 of that Act provides that "All Act [sic] or parts of Acts inconsistent herewith are hereby repealed."

2. State Statutes.

MONTANA CODE ANNOTATED [hereinafter MCA]:

Oil and Gas Net Proceeds Tax, §15-23-601, -603, -605, -607, -608, MCA (Pet. App. 181).

Oil and Gas Severance Tax, §§15-36-101, -103, -105, MCA (Pet. App. 195).

Resource Indemnity Trust Tax §§15-38-103, -104, -105, -106, -108, MCA (Pet. App. 206).

Oil and Gas Conservation Tax, §§82-11-101 (in pertinent part), -131, -132, MCA (Pet. App. 215).

REVISED CODES OF MONTANA, 1947 [hereinafter R.C.M. 1947]:

Oil or Gas Producers Severance Tax, §§ 84-2202, -2204, -2205, and -2209.1, R.C.M. 1947 (the predecessors to §§15-36-101, -103, and -105, MCA) (Pet. App. 222).

STATEMENT OF THE CASE

The Blackfeet Tribe of Indians filed this case in 1978. The first amended complaint (J.A. 9a) challenged taxation

of the Tribe's royalty interests in oil and gas produced on the Blackfeet Indian Reservation, Montana.[2] The Blackfeet Tribe is the lessor of 125 parcels of tribal land for oil and gas mining purposes. All of the challenged taxes

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2 Four taxes are at issue: (1) the Oil and Gas Conservation Tax, §82-11-131, MCA (formerly §60-145, R.C.M. 1947) (Pet. App. 215); (2) the Resource Indemnity Trust Tax, §15-38-104, MCA (formerly §84-7006, R.C.M. 1947) (Pet. App. 206); (3) the Oil and Gas Severance Tax, §15-36-101, MCA (Pet. App. 195); (4) the Oil and Gas Net Proceeds Tax, §§15-23-601, et. seq., MCA (formerly §§84-7201, et. seq., R.C.M. 1947) (Pet. App. 181). The State of Montana through the Montana Department of Revenue collects all taxes except the Oil and Gas Net Proceeds Tax. Although reported to the Department of Revenue, it is collected by the respective county treasurers for the use of the counties. Petitioners Glacier and Pondera Counties have portions of the Blackfeet Reservation within their boundaries.

are paid by non-Indian lessees.[3] The Tribe admits that it has not directly paid any of the taxes, but asserts that the producers have deducted the Tribe's share of taxes from the royalty payments. No producer is a party to this action.

Leasing of the Blackfeet Tribe's oil and gas began in 1932. Until 1977, the State collected taxes on all oil and gas production in the State of Montana, including production from Blackfeet leases. The taxes were collected pursuant to the specific taxation authority granted to states by the Indian Mineral Leasing Act of 1924, Act of May

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3 The lessee-producers' portion of the taxes is not challenged in this case. After this case was filed, various producers challenged the taxes on the producer's share and the share which might be attributed to the royalty interest in Montana state court proceedings.

29, 1924, 43 Stat. 244, 25 U.S.C. §398 (Pet App. 154) [hereinafter the "1924 Act"], on oil and gas production on "unallotted land" within the Blackfeet Indian Reservation. The question in this case is whether the 1924 Act's taxation authority survived the passage of the Indian Mineral Leasing Act of 1938, 25 U.S.C. §§396a-396g (Pet. App. 175) [hereinafter the "1938 Act"].

The validity of Montana's taxes on oil and gas production of the Blackfeet tribal minerals leased prior to the 1938 Act was upheld by the Montana Supreme Court and this Court in 1936 in British-American Oil Producing Co. v. Board of Equalization, 299 U.S. 159 (1936), aff'g 101 Mont. 293, 54 P.2d 129 (1936). The complaint in British-American was filed by a producer-lessee, and the Blackfeet Tribe filed a complaint

in intervention in the state court proceedings. Montana's gross production and net proceeds taxes at issue in that case were predecessors to the present taxes, and were all assessed against and collected from the producer-lessees, who then could deduct the taxes paid on royalty interests from the royalty payments which were paid to the United States. See British-American Oil Producing Co., supra, 54 P.2d at 131-32.

Since their unsuccessful complaint in intervention in British-American, the Blackfeet Tribe made no other challenge to these taxes until 1976 when the Tribe filed and later dismissed a case similar to this one, contesting the collection of taxes by Montana and certain counties, as well as the involvement of the Bureau of

Indian Affairs.[4] Similarly, no oil and gas producers challenged the taxes. The United States Department of Interior has never challenged the taxes but has consistently recognized the taxes as legitimate. The Department of Interior and the United States Geological Survey, charged with administration of the Tribe's leases and collection of royalty payments, permitted payment of the challenged taxes from the inception of oil production until 1977 when Leo Krulitz, then Solicitor of the Department of Interior, issued an opinion holding that the 1938 Act "replaced" the 1924

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4 Blackfeet Tribe of the Blackfeet Indian Reservation and the Gros Ventre and Assiniboine Tribes of the Fort Belknap Indian Community of the Fort Belknap Indian Reservation v. The Department of Revenue of the State of Montana, et al., No. CV-76-6-GF, U.S. District Court for the District of Montana, Great Falls Division.

Act, and that the State could not levy its taxes on oil and gas production from leases made under the 1938 Act. 84 Interior Dec. 905 (1977), (Pet. App. 267). Shortly thereafter, the Blackfeet Tribe filed the instant action. First Amended Complaint of the Blackfeet Tribe (Pet. App. 131).

In 1938, Congress passed the Indian Mineral Leasing Act of 1938, supra. The 1938 Act changed or did away with various specific provisions of prior Indian mineral leasing acts, and in its last section stated that "All Act [sic] or parts of Acts inconsistent herewith are hereby repealed." Neither the 1938 Act nor any contemporary commentary made any mention of changes or repeals of the tax authorization of the 1924 Act.

In the district court, the Tribe, the State of Montana and the Director of

the Montana Department of Revenue, and Pondera County filed motions for summary judgment. United States District Judge Hatfield granted the State's motion for summary judgment, holding that the 1924 Act expressly authorized state taxation of all oil and gas production on unallotted Indian land, and that this express provision authorizing state taxation was not implicitly repealed by the provisions of the 1938 Act. (Pet. App. 103). Judge Hatfield did not rule on the State's alternate ground for summary judgment, that the incidence of all taxes except the Net Proceeds of Royalty Tax was upon the non-Indian oil producers, who were required by Montana's

statutes to report and pay all taxes.[5]

The Blackfeet Tribe appealed Judge Hatfield's decision to the Ninth Circuit

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5 The State has never conceded that the tribal royalty was in fact taxed. The Net Proceeds Tax is the only challenged tax in which the producer's interest is mathematically segregated from the royalty owner's interest. The remaining taxes are reported and paid by the producers, and it is not possible for the Montana Department of Revenue to tell from its records what is the arrangement between the producers and the Tribe with respect to proration of the taxes. Montana law permits the producer to pass on a pro rata share of the taxes unless the lease provides otherwise. See, e.g., §§15-36-101(3) (Pet. App. 199) and 15-38-104 (Pet. App. 207) MCA.

The collection mechanism between the producers and the Tribe has been varied. See, e.g., 58 Interior Dec. 535 (1943) (Pet. App. 232); Memorandum M-36246, October 29, 1954 (Pet. App. 248, 251, 257). It is assumed for purposes of this brief that the producer pays the taxes, and either deducts them from the royalty payments or receives a refund from the Department of Interior for the pro rata portion of the tax attributed to the Tribe's royalty. If the State prevails in its argument that the 1924 Act's tax authorization applies to leases made after 1938, all taxes on production will be permissible, including taxes on the Tribe's royalty.

Court of Appeals, and on December 14, 1982, a three-judge panel affirmed the district court's ruling. (Pet. App. 70). The Tribe petitioned for rehearing en banc, which was granted on June 22, 1983, 709 F.2d 521. On rehearing en banc, the Ninth Circuit Court of Appeals held that there had been no repeal of the tax authority in the 1924 Act and that the State continued to have authority to tax oil and gas production for 1924 Act leases.[6] The en banc panel, however, adopted the reasoning of the 1977 Krulitz

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6 The 1924 Act amended the Act of Feb. 28, 1891, 26 Stat. 795, codified at 25 U.S.C. §397 (Pet. App. 150), by extending the term of the leases from ten years to as long as there was production of oil and gas. British-American, supra, held that these Acts should be read together as a whole and that, therefore, the 1924 Act's tax authorization applied to 1891 Act leases. The Ninth Circuit found this "problematic." 729 F.2d at 1195 n. 9. (Pet. App. 13, n. 9.)

opinion and held that the 1938 Act completely replaced all prior leasing acts, including the 1924 Act, so that royalties from production under all leases made after May 11, 1938, are not subject to Montana's taxes. The court held that the 1938 Act had to be read together with the Indian Reorganization Act of June 18, 1934, 48 Stat. 984, 25 U.S.C. §§461-79 (Pet. App. 154) [hereinafter "I.R.A."], and that the Act's policy and purposes would not permit state taxation of Indian royalties from oil and gas produced on unallotted Indian lands.

After holding that the state taxes at issue here were not authorized by the 1938 Act for leases entered into pursuant to that Act (and were, therefore, not authorized at all), the court nonetheless remanded the case to the district court

for a determination of the legal incidence of the State's taxes, and a determination of whether the taxes were preempted, using the analysis required in Crow Tribe of Indians v. Montana, 650 F.2d 1104 (9th Cir. 1981), modified, 665 F.2d 1390 (9th Cir.), cert. denied, 459 U.S. 916 (1982). 729 F.2d at 1203 (Pet. App. 51). Three judges dissented from the holding that the 1938 Act "replaced" the 1924 Act.

SUMMARY OF ARGUMENT

The Ninth Circuit Court of Appeals' opinion demonstrates a masterful, but erroneous, effort to accomplish judicially what Congress did not do--repeal or replace the 1924 Act's express authorization of the State's taxes on production of oil, gas, and other minerals. The 1938 Act was silent

on the issue of taxation and contained a general repealer, repealing only "all Act or parts of Acts inconsistent" with the 1938 Act. The legislative history of the 1938 Act made no mention of changing the provision allowing state taxation of production of oil and gas. The Department of Interior, which had supported adoption of both the 1924 and the 1938 Acts, assisted the State in collecting its taxes on all leases for a period of more than 40 years. The court ignored the plain language of the 1924 Act and discredited the administrative history which is compelling evidence of the continued vitality of the 1924 Act's tax authorization, including for leases made pursuant to the 1938 Act.

In holding that the 1938 Act "replaced" but did not repeal the 1924 Act, the court found that the 1924 tax

authorization was in force for leases made between 1891 and 1938, but by judicial fiat determined that the otherwise operative tax authority did not affect leases made after May 11, 1938.

Rather than use any applicable canons of construction in its analysis of the 1924 and the 1938 Acts, the court attempted to perform the legislative function of interpreting trends, concerns, goals, and policies of Congress. The cornerstone of the court's opinion was its conclusion that the 1938 Act must be viewed in light of the policies of the I.R.A. which also was silent on the topic of state taxation of the production of Indian oil and gas. An application of judicial canons of statutory construction to the two statutes on Indian mineral leasing compels the conclusion that the 1924

Act's tax authorization was not inconsistent in any way with the 1938 Act, and that the 1924 Act's tax authorization was not repealed or otherwise eliminated by the 1938 Act.

Furthermore, if the Court had limited its analysis of Congress' goals and policies in adopting the I.R.A. and the 1924 and the 1938 Acts to what Congress actually said, the court would have had to conclude that Congress expressed no intention whatsoever to eliminate its authorization to states to tax Indians' royalty interest in oil and gas production on their unallotted lands. Both the I.R.A. and the 1938 Act were silent on the matter of the 1924 tax authorization. Despite what appears to have been a scholarly examination of the legislative history of the I.R.A., the court was not able to find any evidence

in the legislative history directly on the topic of state taxation of production of oil and gas owned by Indians, or on Congress' authorization to tax tribal royalties. None exists. Nonetheless, the court held that one of the policies of the I.R.A. was that Indians' oil and gas production should be exempt from state taxation, and that therefore the later 1938 Act "replaced" the 1924 Act's taxation authority. The court thus embarked on the erroneous course of using its perception of general policies pertaining to different acts of Congress in order to rewrite the plain language of statutes and the contemporaneous legislative history of the act in question.

An examination of the I.R.A. and its legislative history and commentary reveals no intent of Congress to reverse

the tax authorization in the 1924 Act or in other Indian mineral statutes. The 1938 Act and its legislative history and commentary show that Congress sought to enact a general Indian mineral leasing act applicable to all minerals. Congress plainly expressed its own intentions in enacting the 1938 Act: to provide that Indian minerals would not be leased without the consent of the affected tribe; to provide for some discretion in the Secretary of the Interior to approve or disapprove of the leases; and to remove the mining of metalliferous minerals on unallotted Indian lands from the provisions of the mining laws of the United States as was provided for in Section 26 of the Act of June 30, 1919, 41 Stat. 31.

The authorization to tax Indian mineral royalties was not inconsistent

with any expressed intent of Congress in passing the I.R.A. or the 1938 Act. The Ninth Circuit theorized that Congress' intent in the I.R.A. to reverse the land allotment policy of the General Allotment Act of February 8, 1887, 24 Stat. 388, 25 U.S.C. §§331-334, resulted in a reversal of the tax authority in the 1924 Act. 729 F.2d 1196-1197 (Pet. App. 17-20). This theory is incorrect. There is nothing in the relevant legislation or legislative histories showing that Congress intended to eliminate the previously granted tax authorization. The tax authorization therefore remains in effect.

ARGUMENT

I. IN THE 1924 ACT CONGRESS AUTHORIZED STATES TO TAX TRIBAL ROYALTIES FROM OIL AND GAS PRODUCTION AND THAT AUTHORIZATION REMAINS IN EFFECT.

A. Congress has not Repealed the 1924 Act's Tax Authorization.

In the 1924 Indian Mineral Leasing Act, supra, Congress expressly authorized states to tax tribal royalties from production of oil and gas and other minerals from unallotted tribal lands. That tax authorization has never been repealed. It therefore remains operative notwithstanding the passage of the 1938 Indian Mineral Leasing Act, supra.

The 1924 Act applied to lands subject to lease for mining purposes under the Act of February 28, 1891, 26 Stat. 795, 25 U.S.C. §397 (Pet. App.

152).[7] In British-American Oil Producing Co. v. Board of Equalization of Montana, supra, this Court held that the Blackfeet Tribe's mineral reserves were unallotted lands that were "bought and paid for" by the Tribe and subject to lease under the 1891 and 1924 Acts, and that they were therefore subject to Montana's mineral taxes under the 1924 Act even though the surface estate may have been allotted.

The State of Montana and the petitioner counties have collected all applicable local and state taxes on oil and gas production on the Blackfeet Reservation from the inception of

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7 Lands subject to lease under this Act were lands occupied by Indians who had "bought and paid for" them, which "are not needed for farming or agricultural purposes, and 'are not desired for individual allotments." (Pet. App. 151).

production until 1977. After this Court in British-American, supra, upheld the collection of taxes which were the predecessors of the taxes at issue here, there was no serious challenge to the continued viability of the 1924 Act's tax authorization, despite the passage of the 1938 Act. The Blackfeet Tribe, which had intervened in British-American in the state court proceedings, did not make any further challenge to these taxes until 1976 when the Tribe filed and later dismissed a case similar to this one, contesting the collection of taxes by Montana and certain counties, as well as challenging the involvement of the Bureau of Indian Affairs in the tax collection. See n. 4, supra. Similarly, no oil and gas producers challenged the taxes.

Not only were there no challenges to the taxes by the affected tribes and

producers, but the United States recognized the continued validity of the taxes until 1977. The United States Department of Interior, charged with administration of the Tribe's leases and collection of royalty payments, has consistently recognized the taxes as legitimate, and, with the United States Geological Survey, has facilitated payment of the challenged taxes from the inception of oil production until 1977, notwithstanding passage of the 1938 Act. Virtually no one in the United States government publicly questioned the validity of petitioners' taxes. In fact, in 1972, the Solicitor General of the United States filed an amicus brief in Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973), stating at page 7 that the state tax authorization in the 1924 Act remained in effect.

The Department of Interior's constant position on the applicability of the challenged taxes to production of oil and gas from tribal lands is documented in a series of memoranda and opinions from the office of the Solicitor of the Department of Interior: 58 Interior Dec. 535 (1943) (Pet. App. 232); Memorandum M-36246 (October 29, 1954) (Pet. App. 248); Memorandum M-36310 (October 13, 1955) (Pet. App. 258); Memorandum M-36345 (May 4, 1956) (Pet. App. 262). The Department's position was questioned by Marvin Sonosky, long-time advocate for the Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation, but the opinions issued rejected his position that the taxes were not valid. Memorandum M-36310, supra (Pet. App. 258); Memorandum M-36345, supra (Pet. App. 262). In 1977, however, the United

States Department of Interior officially changed its position. The change was accomplished through the opinion of then Solicitor Leo Krulitz who held that the 1938 Act "replaced" the 1924 Act, and that the State therefore could not levy its taxes on oil and gas production from leases made after passage of the 1938 Act. 84 Interior Dec. 905 (1977) (Pet. App. 267). Bolstered by the opinion, the Blackfeet Tribe filed the instant action.

The 1977 opinion reversing the 1955 and 1956 opinions was a bolt out of the blue, not only because it summarily reversed a position endorsed by the Department for more than forty years, but also because there had been absolutely no change in the controlling legislation which could provide an impetus to the Department to change its long-time administrative practices.

The Ninth Circuit erroneously adopted the conclusions of the 1977 opinion. In support of its own opinion, the Ninth Circuit relied on the recent edition of F. Cohen, Handbook of Federal Indian Law 409 (1982), which opined that the 1938 Act which repealed "all Act [sic] or parts of Acts inconsistent" with the 1938 Act "likely repealed the prior leasing Acts to which the tax consents had related (as to new leases)." 729 F.2d at 1195 n. 9. (Pet. App. 13 n. 9); 729 F.2d at 1200 n. 20 (Pet. App. 36 n. 20). The authority relied on by the Handbook for this proposition was the 1977 Solicitor's opinion. F. Cohen, Handbook at 409 n. 43. The 1977 Solicitor's opinion was given far greater credence than it deserved. The Ninth Circuit should have considered the fact that the 1942 edition of the Handbook of Federal

Indian Law, written by Felix Cohen almost contemporaneously with the passage of the 1938 Act, contained no support for the court's conclusion that the prior tax authorizations were affected by the 1938 Act.

B. Standard Statutory Analysis Compels the Conclusion that the 1924 Act's Taxation Authority Survived the Passage of the 1938 Act.

The Ninth Circuit erroneously held that the 1924 Act's taxation authority disappeared for leases made after passage of the 1938 Act. In evaluating whether the clear authority in the 1924 Act for the State to tax tribal royalties vanished with passage of the 1938 Act, the Ninth Circuit should have used standard canons of construction. The court should have examined Section 7 of the 1938 Act which repealed only those

parts of previous acts inconsistent with the 1938 Act; should have applied accepted canons of construction for looking at general legislation on the same subject for which specific legislation exists; and should have reviewed the two statutes together in order to determine whether one statute or a part of it was repealed. The analysis also should have included a review of the administrative practice relating to the legislation.

If done, such an analysis compels the conclusion that Congress' grant of authority to states to tax tribal royalties remains intact. First, an analysis of Section 7 of the 1938 Act compels the conclusion that provisions of previous acts not inconsistent with the 1938 Act remained intact. The tax authorization in the 1924 Act is such a

provision. When Congress included Section 7 in the 1938 Act, the standard construction given such a clause repealing inconsistent acts or parts of acts was that it was in "legal contemplation a nullity," expressly limiting the repeal to acts that are inconsistent. 1A C. Sands, Sutherland Statutory Construction §23.08 at 221 (4th ed. 1972). That standard construction, still used today, had long been in effect in 1938. This Court stated in 1885 that a clause repealing only "inconsistent acts" "implies very strongly that there may be acts on the same subject which are not thereby repealed." Hess v. Reynolds, 113 U.S. 73, 79 (1885). Even earlier, this Court said that a repealer of inconsistent provisions is a plain indication of Congress' intention "to leave in force some portions of former

acts relative to the same subject matter." United States v. Henderson, 78 U.S. (11 Wall.) 652, 656 (1870).

The significance of Section 7 of the 1938 Act is that the 1938 Act was not intended to be comprehensive to the exclusion of all provisions of then-existing statutes[8] relating to mineral leasing of unallotted Indian lands. There is nothing in the 1938 Act inconsistent with the 1924 Act's authority for state taxation of tribal royalties. As a matter of fact, less

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8 In addition to the tax authorization in the 1924 Act for treaty reservations, there had been other authorizations to tax Indian royalties passed by Congress in various Indian mineral leasing acts. See, e.g., Act of March 3, 1921, 41 Stat. 1249-1250; Act of April 28, 1924, 43 Stat. 176, 25 U.S.C. §401; Act of March 3, 1927, 44 Stat. 1347; Act of May 10, 1928, 45 Stat. 496. As with the tax provision in the 1924 Act, the taxation authority in these statutes is clear and unambiguous.

than a week before the 1938 Act was passed there were hearings before the Senate Committee on Indian Affairs relating to a resolution which, inter alia, would have permitted an accounting of mineral production taxes which states had not been able to collect on production of Indian minerals prior to the enactment of the various tax consent statutes. That hearing demonstrated that at the time Congress was about to pass the 1938 Act, no one was questioning or trying to eliminate the authorization of state taxation of Indian mineral production. Loss of Revenue-Tax Exempt Indian Lands, Hearing on S. Res. 168 Before the Senate Committee on Indian Affairs 5, 10, 75th Cong., 3d Sess. (May

6, 1938).[9] It is absurd to conclude that this congressional authorization to tax, unquestioned on May 6, 1938, is inconsistent with the 1938 Act, passed five days later on May 11, 1938. Congress knew how to repeal the taxing provisions contained in the 1924 Act, and knew how to repeal all provisions of all previous mineral leasing acts. It did

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9 The Ninth Circuit cited this hearing as an indication that desire to authorize taxation was an out-moded response to states' concerns with the tax exempt status of Indian lands and property where the states were funding services to Indians. 729 F.2d at 1196 n. 13 (Pet App. 18 n. 13). The Ninth Circuit ignored the fact that at the hearing the witnesses recited the questions and problems related to taxation of Indian property and income which existed prior to the congressional authorizations for states to tax mineral production on Indian lands. At the hearing, no one questioned that those taxation provisions contained in various mineral leasing acts were in effect.

not do so, however, and the Ninth Circuit was wrong in concluding that all acts prior to the 1938 Act were "replaced."

The 1924 and 1938 Acts are on the same subject--Indian mineral leasing--and should therefore have been analyzed using certain rules of statutory construction. Since there is no explicit repeal, the court should have analyzed whether one statute repealed the other by implication. There is a strong presumption against repeals by implication. United States v. Borden Co., 308 U.S. 188, 198 (1939); Frost v. Wenie, 157 U.S. 46, 58 (1895). As explained by this Court:

> There are two well-settled categories of repeal by implication--(1) where provisions in the two acts are in irreconcilable conflict, the later act to the extent of the conflict constitutes an implied repeal of the earlier one; and (2) if the later act covers the whole subject of the earlier

> one and is clearly intended as a substitute, it will operate similarly as a repeal of the earlier act. But in either case, the intention of the legislature to repeal must be clear and manifest....

Posadas v. National City Bank, 296 U.S. 497, 503 (1936) (Emphasis added).

It is well settled that the courts must not use a strained construction of a statute in order to find an inconsistency. United States v. Noce, 268 U.S. 613, 619 (1925). Inconsistency is never presumed, and will not be found if any other reasonable construction exists. Frost v. Wenie, supra, 157 U.S. at 58.

There is no inconsistency between the 1924 Act's express authorization to tax and the 1938 Act's silence on taxation. The taxation authority in the earlier act continues in force, including for leases entered into after passage of

the 1938 Act. Under applicable rules of statutory construction, there is no need to examine the underlying unexpressed intent of Congress in passing the 1938 Act, as the Ninth Circuit Court did. An intent to repeal must be "clear and manifest." Posadas v. National City Bank, supra, 296 U.S. at 503. However, as discussed infra, Section IV, such an analysis, if applied, reveals only that Congress expressed no suggestion or intent to repeal, reverse, or replace the 1924 Act's authorization to tax tribal royalties, even though Congress itemized in detail the specific provisions of previous mineral leasing acts which were to be corrected or changed in what was to become the 1938 Act.

This canon of construction relating to two statutes on the same subject applies when there is a later general

statute and an earlier specific statutory provision. Then the principle against repeals by implication is especially strong. In British-American Oil Producing Co. v. Board of Equalization, supra, 299 U.S. at 166, this Court stated that:

> [t]he special provisions related to the same subject that is dealt with in the general provisions and are to be read in the light of the latter. All were in force when the lease was given and all should be treated as one law so far as this reasonably could be done.... [T]here is no conflict, nor anything to prevent all from being carried into effect as if there were one law.

See also MacEvoy Co. v. United States, 322 U.S. 102 (1944); Morton v. Mancari, 417 U.S. 535 (1974). In Morton v. Mancari, this Court stated that: "[w]here there is no clear indication otherwise, a specific statute will not be controlled or nullified by a general

one...." 417 U.S. at 550-551.

Finally, when looking at whether an earlier statutory provision continues to exist when there is a later statute on the same subject, a court cannot overlook or ignore the history of administrative practice related to a statutory provision. In the instant case, the Ninth Circuit did overlook the United States' consistent practice of over forty years of authorizing and recognizing the power of the State to collect the taxes in question. The enactment of the 1938 Act had no effect upon the Department of Interior's interpretation that the 1924 Act's tax authorization continued in effect for post-1938 leases. See discussion supra at 28-30.

This sort of interpretation by the department charged with administration of the 1938 Act must be given consideration

and deference by courts. Rice v. Rehner, 103 S. Ct. 3291, 3301 n. 13, ___ U.S. ___, (1983). This deference should be accorded to the interpretation of the Department of Interior immediately following enactment of the 1938 Act, not the unfounded interpretation of 40 years later. That earlier interpretation, especially when coupled with the constant collection of the taxes, represents a "contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new." Aluminum Company of America v. Central Lincoln Peoples' Utility District, 104 S. Ct. 2472, 2480, ___ U.S. ___, (1984) (Citations omitted).

The Ninth Circuit erred in overlooking the long-time administrative

practice of allowing the taxes to be collected. It likewise erred in refusing to consider or apply standard canons of statutory construction either to Section 7 of the 1938 Act, or to the court's analysis of the 1924 and 1938 Acts together. The court strained to defeat the 1924 tax authorization, and should be reversed.

II. THE NINTH CIRCUIT ACTED ERRONEOUSLY TO EXCISE JUDICIALLY THE 1924 ACT'S TAXATION AUTHORITY.

Rather than use the standard statutory constructions applicable when there are two statutes on the same subject, the Ninth Circuit considered trends, goals, and policies. The court made determinations of a sort reserved for legislators rather than judges. The court did not confine itself to looking at the policies and goals of the 1938 Act

in order to interpret that Act and the 1924 Act. Instead, it looked to a variety of legislative comments and used what it perceived to be the purpose of the I.R.A. as a back-drop for interpreting the 1938 Act. The court concluded that by 1938 the tax authorizations contained in various mineral leasing acts were defunct.

The court was wrong. The I.R.A. did not deal with the taxation of minerals or royalty income at all. As discussed infra, Section III, the Ninth Circuit attributed to Congress the wrong trends, intents, and policies in relation to tax authorizations in mineral leasing acts. Even if the court had been more accurate in its perceptions of Congress' intents and policies, the court's use of these in order to eliminate Congress' clear authorization to states to tax royalty

income was an improper use of judicial power which must be overruled.

Questions of tax immunities and authorizations are peculiarly legislative in nature and are not to be eliminated by implication. E.g., First Agricultural National Bank v. State Tax Commission, 392 U.S. 339 (1968). In relation to tax authorizations and immunities for Indians, this Court has stated that the question of whether an immunity from taxation exists is "essentially legislative in character." Mescalero Apache Tribe v. Jones, supra, 411 U.S. at 150. In that case, it was argued that Section 5[10] of the I.R.A. exempted revenues from tax-exempt lands from state

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10 Section 5 of the I.R.A. provides in relevant part that lands or rights acquired pursuant to the I.R.A. "shall be exempt from State and local taxation." See discussion, Part III, infra.

and local taxation. See, e.g., Amicus Brief of United States 7, Mescalero. This Court rejected that argument. This Court recognized that courts ordinarily will not imply tax exemptions, and held that the I.R.A. did not create tax immunities not explicitly set forth in the I.R.A., including for income gained from tax-exempt land. Mescalero Apache Tribe v. Jones, supra, 411 U.S. at 157-158.

In areas other than taxation, this Court has rejected arguments that the policy and intent of the I.R.A. should be used in order to interpret separate statutes. Reversing a decision by the Ninth Circuit last year, this Court declined to apply policies of the I.R.A. to override specific statutory provisions relating to liquor sales in "Indian Country." Rice v. Rehner, supra, 103 S.

Ct. 3291, ___ U.S. ___, (1983), rev'g 678 F.2d 1340 (9th Cir. 1982). One of the arguments made by Eva Rehner was that the I.R.A. policy should be applied in order to find that Congress intended that states lack jurisdiction over Indian country liquor licensing and distribution. Respondent's Brief on the Merits 11, Rice v. Rehner. This Court did not adopt that analysis.[11]

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11 In 1982, the Ninth Circuit itself declined to apply congressional policies toward Indians to an analysis of whether a later statute impliedly repealed an earlier statute, even though the court acknowledged that the United States' policy toward Indians had likely changed, "shifting away from an assimilationist approach in the years since the allotments were made." Southern California Edison Co. v. Rice, 685 F.2d 354, 356 (9th Cir. 1982), cert. denied, 103 S. Ct. 1497, ___ U.S. ___ (1983). In Fort Mojave Tribe v. County of San Bernardino, 543 F.2d 1253, 1256 (9th Cir. 1976), cert. denied, 430 U.S. 983 (1977), the Ninth Circuit held that Section 16 of the I.R.A. did not preclude state taxation of leaseholds of tribal land.

The Ninth Circuit's opinion, misapplying congressional trends and I.R.A. policies in order to eliminate Congress' clear authorization to tax tribal royalties, represents a misuse of judicial power. This approach must be reversed.

III. THE INDIAN REORGANIZATION ACT DID NOT CANCEL CONGRESS' AUTHORIZATION OF TAXATION OF TRIBAL ROYALTIES.

The Ninth Circuit's rationale for applying its perception of the congressional policy behind the I.R.A. to its interpretation of the 1938 Act was that one stated purpose of Congress in passing the 1938 Act was to "bring all mineral leasing matters in harmony with the [I.R.A.]." 729 F.2d at 1198 (Pet. App. 27). In fact, that was a purpose of the 1938 Act. S. Rep. No. 985, 75th Cong., 1st Sess. (1937) (Pet. App. 343,

346-353) [hereinafter "S. Rep. No. 985"]; H. Rep. No. 1872, 75th Cong., 3d Sess. (1938) (Pet. App. 355) [hereinafter "H. Rep. No. 1872"]. However, Congress specified the very provisions of the I.R.A. with which the 1938 Act was to harmonize. E.g., S. Rep. No. 985 (Pet. App. 345-346). Those provisions, in Sections 16 and 17 of the I.R.A., gave tribes which were organized under the I.R.A. the authority to lease their lands (albeit for no more than ten years), and to prevent the leasing of tribal lands without tribal consent. At times in its opinion, the Ninth Circuit appeared to recognize that these were the I.R.A. provisions with which Congress sought to harmonize the previous Indian mineral leasing acts. 729 F.2d at 1198 (Pet. App. 25-26), 729 F. 2d 1199 (Pet. App. 31-32). Despite this apparent recognition by the

court, the court's prevailing rationale for its opinion seemed to be that the 1924 Act's tax authorization was a part of Congress' earlier policy embodied in the General Allotment Act of February 8, 1887, 24 Stat. 388, 25 U.S.C. §§331-334, and that in 1934 Congress saw that policy as evil. The Ninth Circuit seemed to conclude that in passing the I.R.A. Congress reversed the allotment policy, and must also have intended to do away with the 1924 Act's authorization to tax mineral production, even though Congress did not say so, and even though the 1924 Act applied to minerals which had not been allotted. Although the court did not go so far as to hold that the I.R.A. itself repealed all acts which the Ninth Circuit viewed as being inconsistent with the I.R.A. policies, it did conclude that the 1924 Act's tax authorization was

limited to leases entered into prior to passage of the 1938 Act. For those leases, the taxes may be collected, although the taxes are contrary to the Ninth Circuit's view of the policies of the I.R.A.

The 1924 Act, of course, already had a provision which would allow tribes to prevent unwanted leasing by withholding their consent to a lease, although under this Act leasing was to be done by the Secretary of the Interior.

In addition to eliminating conflicts between Sections 16 and 17 of the I.R.A. and earlier mineral leasing statutes, Congress sought to cure specific defects which it saw in existing mineral leasing statutes, specifically in Section 26 of the Act of 1919, supra. None of these specific problems was related in any way to the previously granted authority to

tax tribal royalties. See Section IV, infra.

In support of its thesis that the I.R.A. policies prohibited taxation of Indian royalties, the Ninth Circuit opinion made numerous references to legislative hearings and commentary about the I.R.A., but cited nothing that directly dealt with taxation. The obvious reason for the lack of references to comments on taxation in the opinion is that no such material exists in the I.R.A. legislative history. Instead, the opinion focused upon the fact that the I.R.A.'s primary purpose and objective was to reverse and repudiate the previous program of allotting parcels of land to Indians under the allotment program, which had become a "scandal and a blot." 729 F.2d at 1197 (Pet. App. 18-20), citing 78 Cong. Rec. 11727, 11126, and

11743 (1934). Review of the referenced pages of the Congressional Record reveals that the "blot," the "tragedy," the "evil," and the "scandal" of the allotment policy which Congress wanted to reverse and cure was the loss of huge amounts of Indian lands. This was the primary purpose of the I.R.A. and the subject of lengthy committee hearings. E.g., Hearings on S. 2755 and S. 3645. Before the Senate Committee on Indian Affairs, 73d Cong., 2d Sess. (1934) [hereinafter "I.R.A. Hearings"] at 57, 61, 117, 133-34, 143, 147, 148, 153, 173, 183, 190. The I.R.A. stopped further allotments and provided for reacquisition of lands by tribes. None of the discussion about the lands lost through the allotment system or the lands to be revested in tribes pursuant to the I.R.A. included discussions of mineral estates.

The probable reason for this was that mineral deposits were not generally desired for individual allotments and were not, therefore, likely to be allotted or lost to the tribes through the allotment program. See, British-American, supra, 299 U.S. at 164.

The Ninth Circuit's review of the I.R.A. and its legislative history was correct only insofar as it addressed the primary purpose of the I.R.A. which was to stop land losses. The court's remaining inferences and conclusions that the 1924 Act's tax authorization was inconsistent with the I.R.A.'s policies are without any support in the statute or its legislative history. The court's numerous references to the legislative history simply do not support its conclusions.

During the I.R.A. Hearings, Congress

repeatedly set forth a list of the goals and purposes of the I.R.A. and the problems which Congress sought to cure. E.g., 78 Cong. Rec. 11727. Not one of those listed purposes or problems concerned state taxation of any sort. It is significant that the only subject mentioned without criticism by Congress in its litany of the plight of the Indians and the causes of Indian problems was oil and mineral royalty payments made to the Indians, including in Montana. 78 Cong. Rec. 11728 (remarks of Mr. Howard).

The only other noteworthy mention of Indian mining and mineral leasing in the legislative history to the I.R.A. involved the Papago Reservation. A 1932 Interior Department decision had erroneously ruled that the Papagos' mineral estate was to be withdrawn from mineral entry under the public land

mining laws, even though the agreement and the executive order creating the Papago Reservation had specifically reserved the mineral estate to the United States, and had kept the minerals open to exploration and location under public mining laws. E.g., 78 Cong. Rec. 11127-11134, 11137. In order to repudiate that erroneous decision, Congress included specific language reversing the Interior Department opinion in what became Section 3 of the I.R.A. (Pet. App. 155-156).[12]

Aside from the lengthy discussions on the Papago minerals and the favorable reference to royalty payments for tribal

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12 In the Appendix to the Petition for Certiorari, the I.R.A. is reproduced as it existed prior to various later amendments which do not affect this case, including a repeal in 1955 of the Papago mineral provision.

minerals, the I.R.A. legislative history does not contain any discussion of taxation of royalties or of the then well-established tax consent provisions of Indian mineral leasing acts. The Ninth Circuit thus was wrong in implying in its opinion that the I.R.A.'s legislative history supported its opinion.

Even when Section 5 of the I.R.A., the only section of the Act dealing directly with tax exemptions, was being discussed in Congress, e.g., 78 Cong. Rec. 11126, there was no suggestion of eliminating the authorized taxes on tribal royalties. In addition, it is significant that Congress rejected provisions of predecessor bills to the I.R.A. which provided for broad immunities from state and local taxes. The earlier provisions stated that "nothing in this Act shall be construed

as rendering the property of any Indian Community...subject to taxation, by any State or subdivision thereof...." H.R. 7902, 73d Cong., 2d Sess., 78 Cong. Rec. 2437 (1934); S. 2755, 73d Cong., 2d Sess., 78 Cong. Rec. 2440 (1934).

In the I.R.A. Hearings, there was mention of the states' losing taxes because of the implementation of the I.R.A. I.R.A. Hearings at 160. Apparently, Congress was sensitive to this problem, because the I.R.A. did not include the broad tax immunities included in the predecessor bills.[13] The Ninth

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13 At the same time that these broad tax-immunity provisions were eliminated, accompanying provisions for more extensive powers on the part of Indian communities chartered under the proposed I.R.A. were also discarded. One of the specified powers included but later eliminated was the power of an incorporated Indian Community to conduct mining activities. H.R. Rep. No. 1804, 73d Cong., 2d. Sess. 6 (1934).

Circuit, however, ignored the elimination of the broad tax immunities. Moreover, the Ninth Circuit concluded that in 1934 and 1938 Congress was no longer concerned about states' losing revenues because of tax exemptions for Indian lands. The court stated that the tax authorizations in the 1924 Act and in the Act of March 3, 1927, 44 Stat. 1347, 25 U.S.C. §§398a-398e,[14] were adopted in response to these concerns, but erroneously concluded that by 1934 and 1938 those concerns had disappeared. 729 F.2d 1192 (Pet. App. 17-18). The legislative history does not support the Ninth Circuit's conclusion.

This Court has viewed elimination of

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14 The 1927 Act authorized state and local taxation on oil and gas production on executive order reservation lands. See Amici Curiae Brief submitted in support of the Petitioners.

the broad tax immunities in the predecessor bills as one indication that the I.R.A. was not intended to create tax immunities not specifically set forth in the I.R.A. Mescalero Apache Tribe v. Jones, supra, 411 U.S. at 157. In Mescalero, various entities, including the United States, argued that state taxation of tribal income from tax exempt land frustrated and destroyed the policy of Congress expressed in the I.R.A. to encourage tribal development, economic independence and self-government. E.g., Amicus Brief for Agua Caliente Band of Mission Indians 3, 6-7, 12; Amicus Brief for the United States 7; Amicus Brief for the Association of American Indian Affairs 12, 15, Mescalero. This Court rejected those arguments and held that Sections 5, 16, and 17 of the I.R.A. did not imply an expansive tax immunity.

The Ninth Circuit, however, essentially concluded that in passage of the I.R.A. Congress did imply an expansive immunity from taxation which had been specifically authorized in the 1924 Act. The court held that because the I.R.A. was designed to help Indians become economically independent and self-sufficient and take control of their own resources, the I.R.A.'s goals showed that Congress intended to end state taxes authorized by the 1924 Act. 729 F.2d at 1197 (Pet. App. 22-23).[15] In addition to

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15 The Tribe's complaint only alleges that the 1924 authority to tax was limited to 1924 Act leases, as the 1938 Act "replaced and supplanted" the earlier mineral leasing act. Neither the complaint nor the record in this case alleges or suggests that the tax authority should disappear because it interferes with tribal self-sufficiency or independence. The only thing mentioned as a boon to Indian economy in discussions of the Indian plight in 1934 was royalty payments, which were then subject to taxation. 78 Cong. Rec. 11728.

references to the Congressional Record where these goals were discussed, the Ninth Circuit cited Morton v. Mancari, supra, 417 U.S. at 542, as support for its ruling. Id. Morton v. Mancari did hold that Congress enacted the I.R.A.'s employment preference provision in order to help Indians take control of their own resources and become self-sufficient. The Ninth Circuit, however, overlooked the fact that Morton v. Mancari dealt with a very specific provision for Indian preference in employment which was included in the I.R.A in order to implement the goals of Congress. One of the ways by which Congress envisioned achieving the goal of tribal autonomy was to ensure that Indians could and would become employed by the Bureau of Indian Affairs which was staffed almost entirely by non-Indians in 1934. In addition to

enacting Section 12 of the I.R.A. providing for Indian employment preference in the B.I.A. in order to effectuate this goal, Congress explicitly referred to the effect this statute would have on the existing civil service laws. At the request of Commissioner Collier, the language "without regard to civil service laws" was added to the provision directing the Secretary of the Interior to establish various standards for Indians who might be appointed to positions in the B.I.A. See I.R.A. Hearings at 256-259.

All indications are that Congress did not intend or imagine that the goals of the I.R.A would change existing law without any specific action by Congress. In addition to the specific provision on Indian preference in employment, Congress included other specific provisions in the

I.R.A. to implement the goal of increased tribal control over tribal economies and resources. Congress established an Indian credit system and fund (see, e.g., I.R.A. Hearings at 154, 168) and gave tribes the ability to prevent land losses and leasing. Moreover, there were references in the I.R.A. to statutes which were outdated in light of new policies. For example, during the Senate committee hearings on the I.R.A., it was acknowledged that the then existing federal Indian liquor laws, 18 U.S.C. §§1154 and 1156, prohibiting liquor transactions in "Indian Country" or with Indians, had outlived their purpose and were contrary to common sense and national policy. I.R.A. Hearings at 200. Nonetheless, an explicit repeal by Congress in 1953 was required to nullify the absolute prohibition. 18 U.S.C.

§1161. If statements of congressional policy made during the I.R.A. hearings were sufficient to override existing statutory provisions which were arguably inconsistent with the policy of the I.R.A., Congress' enactment of 18 U.S.C. §1161 would have been unnecessary and inexplicable.

Even after the I.R.A. was passed, Congress specifically consented to state taxation of all mineral production, including against the royalty interests from unrestricted lands in Oklahoma in the Act of June 26, 1936, 49 Stat. 967, 25 U.S.C. §501. Also, as discussed above at p. 36, the May 6, 1938 Hearing on S. Res. 168 indicated that congressionally authorized taxation was not, at that date, perceived as being harmful, diminished by the I.R.A., or about to be eliminated by the 1938 Act.

One post-1938 Act indication that neither Congress nor the Commissioner of Indian Affairs was concerned with eliminating the states' power to tax mineral production under the I.R.A. is a remark of Commissioner Collier on the I.R.A. In an annual report, 1941 Secr. Inter. Annual Report 451, Mr. Collier noted the lack of tribal economic improvement and independence despite the passage of the I.R.A. seven years before. Commissioner Collier concluded that the slow economic improvement of the Indians was caused by Congress' refusal to appropriate the funds authorized in the I.R.A. for tribal economic development. This report was made in 1941, when Montana's taxes in question here were being collected, and after the Montana Board of Equalization had been successful

in its defense of the taxes in British-American, supra. Mr. Collier did not blame state taxation of tribal royalties as a cause of the failure of tribes to develop as planned by the I.R.A.

Even if it were acceptable for the Ninth Circuit to try to divine Congress' policies and goals in passing the I.R.A. in relation to state taxation of Indian minerals, the court's conclusion that the I.R.A. eliminated the congressionally authorized taxes in issue is not supportable. Congress' authorization of states' taxation of tribal royalties is not adverse to any policy or intention stated by Congress in adopting the I.R.A. or the 1938 Act, and the specific provisions of the I.R.A. with which Congress sought to harmonize the 1938 Act have nothing to do with state taxation.

Contrary to the Ninth Circuit's conclusion, the legislative history of the I.R.A. itself reveals no intention by Congress to end previously authorized state and local taxation of mineral production on the Blackfeet or any other Indian reservation in order to encourage tribal autonomy. The "about-turn" that Congress attempted in the I.R.A. was to stop the allotment program and the resulting loss of Indian lands. The Ninth Circuit's broad and incorrect construction of the I.R.A. as applied to the court's interpretation of the 1924 and the 1938 Acts should be reversed. If any part of the I.R.A. is to be read together with the 1938 Act it should be the provisions of Section 16 and 17 dealing with leasing. Those provisions have no effect at all on the tax authorization in the 1924 Act. The 1924

Act's tax authorization was not, as the Ninth Circuit concluded, a thing of a by-gone day when the Allotment Act and its policy were in effect.

IV. THE 1924 ACT'S AUTHORIZATION TO TAX IS NOT CONTRARY TO THE PURPOSE OF THE 1938 ACT, AND WAS LEFT INTACT BY THAT ACT.

The Ninth Circuit bolstered its conclusion that the 1938 Act dispensed with the 1924 Act and its authorization to tax by misreading the legislative history of the 1924 and 1938 Acts. The Ninth Circuit concluded that the purposes of the 1938 Act were contrary to the purposes and language of previous Indian mineral leasing acts, including, especially, the 1924 Act. 729 F.2d at 1198 (Pet. App. 24-27). That is not true.

The court stated that the purpose and incentive behind the 1924 Act,

gleaned from "common themes" of various pieces of congressional legislation over a span of seventeen years (729 F.2d 1196, Pet. App. 15-18),[16] was to encourage non-Indian development and settlement on tribal lands. The Ninth Circuit concluded that this purpose differed substantially from the purpose of the 1938 Act which was to foster tribal autonomy.

Yet, a review of the legislative history of the 1924 Act itself shows that its over-all purposes were not different from the pruposes of the 1938 Act. Both acts were passed in order to have oil and gas on tribal lands developed and yield returns for the benefit of Indians. The

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16 Curiously, none of the court's references for this proposition is to the 1924 Act, in the year 1924, or related to Congress' consideration or passage of the 1924 Act.

1938 Act included this purpose for metalliferous minerals as well. All of the changes effected by the 1938 Act on previous Indian mineral leasing acts were specified in the legislative history to the 1938 Act and made clear in the Act itself. None of those changes concerned existing tax authorizations.

The bill which became the 1924 Act was introduced at the request of the Department of Interior to cure specific problems in previous laws affecting oil and gas leasing on unallotted lands. Those problems were that Indian oil and gas were not being leased or developed up until that time because of the ten-year time limitation on mining leases under the Act of 1891, supra. Congress saw that this "absolutely impracticable" ten-year limitation for oil and gas leasing needed to be extended in order to

encourage development for the benefit of the Indians. See S. 2314, 68th Cong., 1st Sess., Vol. 65, Part 9, Cong. Rec. 8597 (May 15, 1924); S. 2314, 68th Cong., 1st Sess., Vol. 65, Part 6, Cong. Rec. 5492 (April 3, 1924). Congress was concerned that very frequently non-tribal tracts were developed adjacent to the tribal tracts, with the result of "drainage [from the tribal tract] in some instances." Id. The 1924 Act encouraged development of the tribal lands so that Indians could capture the benefit of the oil and gas, rather than lose the oil and gas to the adjacent non-tribal tracts being develop. The legislative history to the 1924 Act thus shows that Congress viewed the failure to develop Indian oil and gas as a loss to the Indians, not as a loss to would-be oil and gas developers who were non-Indian.

There are other indications that after passage of the 1924 Act Congress did not change its approach, but continued to view development of Indian resources to be advantageous to tribes. For instance, in considering the oil and gas leasing Act of March 3, 1927, n. 8 supra, Congress viewed royalty payments to Indians from the development of tribal natural resources to be of benefit to the Indians. As in the 1924 Act, taxation was permitted. Thus, again, Congress did not perceive taxation of royalties by states to be contrary in any way to the benefit which Indians would derive from oil and gas development. 68 Cong. Rec. 4573 (1927); 68 Cong. Rec. 4578 (1927). See Amici Curiae Brief in support of Petitioners. There is nothing in the legislative history of the 1924 Act or of other mineral leasing acts containing tax

consents to suggest that those acts were enacted, as the Ninth Circuit held, for the benefit of non-Indians urging that Indian lands be developed and opened for the benefit of non-Indians. 729 F.2d 1196 (Pet. App. 17).

There was nothing in the 1924 Act that prompted Congress to consider or pass the 1938 Act. Like the 1924 Act, the 1938 Act was designed to make development of Indian resources more attractive for the benefit of Indians, allowing Indians "to lease more lands so that Indians can have more income." S. 2638, 74th Cong., 1st Sess., Vol. 79 Part 7 Cong. Rec. 7815 (May 20, 1935). (S. 2638 was the predecessor bill to the 1938 Act. See discussion, infra, at 78.) This was to be accomplished by removing Indian leases from the provisions of the public land leasing laws and regulations

and subjecting leases to the consent of the affected Indians. E.g., letter from Commissioner Collier to Senator Thomas, dated July 29, 1937, attached hereto at App. 4, and letter from Secretary H. L. Ickes to Chairman Will Rogers, dated March 26, 1936, attached hereto as App. 5.

The legislative history of the 1938 Act shows that it was designed to cure specific ills resulting from Section 26 of the Act of June 30, 1919 [hereinafter "Section 26 of the 1919 Act"] dealing with mining of metalliferous minerals (but not oil and gas) on unallotted lands. Congress was detailed and specific in designating the existing provisions which it sought to change or eliminate. None of those "problem" provisions dealt with taxing powers of

the states.[17]

The major problem with Section 26 of the 1919 Act was that it permitted the leasing of tribal minerals without the consent of the tribes or of the Secretary of Interior. Section 26 thus did not conform to the I.R.A. provision (Section 16, Pet. App. 171) that tribes organized under the I.R.A. could prevent the leasing of their lands without their consent. (Pet. App. 337-338, 349.) See Vol. 79 Part 7 Cong. Rec. 7815, 74th Cong., 1st Sess. (1935).

A second problem with Section 26 of the 1919 Act which concerned Congress was that it subjected exploration, location

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17 See letter dated April 15, 1935, S. Rep. No. 614, (Pet. App. 333, 335-346), where the problems with the 1919 Act are itemized. See also the letter dated June 17, 1937, S. Rep. No. 985, (Pet. App. 344, 348-353).

and mining of metalliferous minerals on the affected unallotted lands to the public mining laws of the United States, creating serious impediments to mineral development of unallotted lands.

As the Ninth Circuit noted, 729 F.2d at 1198 n. 16 (Pet. App. 26), the predecessor to the bill which became the 1938 Act was S. 2638, 74th Cong., 1st Sess. (1935). That bill appears at App. 1-3, infra. It had first been introduced in 1934.[18] The goals of this unpassed bill, like those of S. 2689 which became the 1938 Act, were to correct the problems caused by Section 26 of the 1919 Act. See n. 17, supra.

The letters from the Department of

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18 S. 3565, 73d Cong., 2d Sess. (1934), H.R. 9427, 73d Cong., 2d Sess. (1934).

Interior supporting the 1937 bill which became the 1938 Act, and the 1935 bill, for general mineral leasing on allotted lands (S. Rep. No. 614, supra, and S. Rep. No. 985, supra, Pet. App. 333, 344) went into detail about what S. 2638 and S. 2689 were to accomplish, namely to remove Indian mineral leasing from the general mineral laws of the United States, and to give the Department of Interior and various Indian tribes the authority to refuse mineral leases which they felt were not economically advantageous to the tribes.[19] See also

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19 The Ninth Circuit concluded that a specific purpose of the 1938 Act was "to give the Indians the greatest return from their property." 729 F.2d at 1199 (Pet. App. 32), quoting S. Rep. No. 985, The quoted language followed the recitation of the obstacles to the Indians' getting a good return from leases of metalliferous minerals under the 1919 Act. Taxation was not one of these obstacles. See Pet. App. 344.

Vol. 79 Part 7 Cong. Rec. 8307, 74th Cong., 1st sess. (1935) and App. 3 and 4, infra. These letters indicated the intent to make it easier than it was under the 1919 Act for a lease applicant to lease unallotted land, (see, e.g., Pet. App. 336-337, 346-348), so that more lands could be leased "to greater advantage to the Indians in definite areas." (Pet. App. 341, 353).

The Ninth Circuit erroneously implied (without expressly holding) that the I.R.A., and therefore the 1938 Act, sought to reverse a 1924 policy of Congress to open Indian lands for increased non-Indian development. 729 F.2d at 1196 (Pet. App. 17). That was not the intent of Congress in passing the 1938 Act. The intent of Congress was to make it so leasing could not take place without the consent of the tribe, and to

get rid of the cumbersome, expensive, time-consuming requirements of Section 26 of the 1919 Act which inhibited mining development on affected lands.

The 1935 bill and the 1938 Act brought all mineral leasing matters in harmony with the I.R.A. by providing that unallotted lands on any Indian reservation (except those excluded) could be leased for all mining purposes for as long as the minerals lasted, by authority of the tribal council, subject to the approval of the Secretary of the Interior.

The Ninth Circuit implied that the congressional desire to increase tribal autonomy over leasing, as reflected in the I.R.A. and demonstrated by the 1938 Act, included a desire to repeal the taxation provision in the 1924 Act. 729 F.2d at 1197 (Pet. App. 22-23). However,

Congress' only concern relating to increased tribal autonomy was with respect to the need to allow tribes to authorize or prevent mineral leasing on their lands. In fact, a provision to allow organized tribes to conduct mining activities had been eliminated from the final version of the I.R.A. See n. 7, supra. Under the 1924 Act, tribal lands could not be leased for oil and gas mining without the consent of the tribe. The 1924 Act was already consistent with the later stated policy of the I.R.A. which was Congress' main concern in passing the 1938 Act.

In 1935, when the bill which was the predecessor to the 1938 Act was drafted, a tribal consent provision was included in the proposed bill (S. 2638), in the same way it appeared in the 1938 Act. The 1938 Act imposed specific requirements on

the leasing procedures that were not set forth in either the 1924 or the 1938 Acts. In addition, the 1935 bill had a provision repealing all acts inconsistent with it, while the 1938 Act changed the repealer to "all Act[s] or parts of Acts" inconsistent with the 1938 Act. (Emphasis supplied) See Section IB, supra. This modified repealer, which was ignored by the Ninth Circuit, made it clear in the 1938 Act that some portions of previous acts could survive the passage of the 1938 Act.

A comparison of the 1924 Act, the 1935 predecessor to the 1938 Act and the 1938 Act itself, reveals the exact changes made to the 1924 Act. There is no justification for the Ninth Circuit's imagining other changes or for implying that Congress intended to reverse a tax authorization which Congress did not

discuss at the time Congress specifically addressed problems with existing legislative provisions. Congress was remarkably detailed and specific in outlining what provisions of previous acts it sought to eliminate or change, as demonstrated by its attaching the supporting letters to the Senate Reports to S. 2638 and S. 2689. In addition, Congress was specific in itemizing new statutory provisions, such as bonding requirements, in the 1938 Act. It is thus absurd for the Ninth Circuit to conclude that there was another unmentioned provision which Congress sought to change in enacting the 1938 Act.

The 1924 Act's tax authorization was not perceived by Congress as being adverse to any of the goals of the 1938 Act. It was not a provision which

Congress sought to undo and reverse in the 1938 Act. It did not simply vanish with the passage of the 1938 Act. The Ninth Circuit's conclusion that the 1924 Act's tax authorization no longer exists for leases made after 1938 must be reversed.

CONCLUSION

For the foregoing reasons, the judgment of the Ninth Circuit Court of Appeals should be reversed.

Respectfully submitted,

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November, 1984.

APPENDIX TO BRIEF OF PETITIONERS

S. 2638
74TH Congress, 1st Session
IN THE HOUSE OF REPRESENTATIVES
May 31, 1935
Referred to the Committee on Indian Affairs

AN ACT

To amend the law governing the leasing of unallotted Indian lands for mining purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That hereafter unallotted lands within any Indian reservation or lands owned by any tribe, troupe [sic], or band of Indians under Federal jurisdiction may be leased by authority of the tribal council speaking for such Indians for not to exceed ten years for mining purposes, subject to approval of the Secretary of Interior and under such rules and

regulations as he may prescribe: Provided, that such unallotted Indian lands, other than lands of any of the Five Civilized Tribes and the Osage Reservation, subject to lease under the provisions hereof, may be leased at public auction by the Secretary of the Interior with the consent of the tribal council speaking for such Indians, for oil and/or gas mining purposes for a period not to exceed ten years and as much longer thereafter as oil and/or gas shall be found in paying quantitites, under such rules and regulations as the Secretary of the Interior may prescribe: And provided further, That the foregoing provisions shall not be construed to restrict the power of tribes, organized and incorporated under sections 16 and 17 of the Act of June 18, 1934 (48 Stat. 984), to lease lands for mining purposes

for the terms provided in this Act and in accordance with the provisions of any constitution and charter adopted under the Act of June 18, 1934.

SEC. 2. That section 26 of the Act of June 30, 1919 (41 Stat. 31), as amended by the Act of March 3, 1921 (41 Stat. 1231), and December 16, 1926 (44 Stat 922-923), and any other Acts inconsistent herewith, are hereby repealed.

SEC. 3. That this Act shall not apply to the Papago Indian Reservation in Arizona.

Passed the Senate May 13 (calendar day, May 28), 1935.

Attest: EDWIN A. HALSEY,

Secretary.

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE COMMISSIONER OF INDIAN AFFAIRS
WASHINGTON

Commr.
JC

July 29, 1937

Hon. Elmer Thomas,

United States Senate.

Dear Senator Thomas:

The explanation which I made about the Indian leasing bill yesterday (S. 2689) was so incomplete that you might be without adequate information if questioned upon the floor. The essence of the bill is to bring all of this class of leases under the Indian leasing law and to subject the issuance of leases to the consent of the duly authorized tribal council. At present, certain classes of land, if leased at all, have to be leased under the public land leasing laws and regulations.

Sincerely yours,

/s/ John Collier

Commissioner.

THE SECRETARY OF THE INTERIOR

WASHINGTON

March 26, 1936

Hon. Will Rogers,

Chairman, Committee on Indian Affairs,

House of Representatives.

My dear Mr. Chairman:

Attention is invited to Senate 2638, which passed the Senate on May 28, 1935, and was referred to your committee on May 31. The bill relates to the leasing of unallotted Indian lands for mining purposes. This is a companion bill to H.R. 7661.

This legislation was recommended by

Department letter of April 15, 1935. The substitution of new provisions of law for section 26 of the act of June 30, 1919 (41 Stat. 31), as amended by the acts of March 3, 1921 (41 Stat. 1231) and December 16, 1925 (44 Stat. 922-923), is necessary to harmonize such leasing activities with the Indian Reorganization Act of June 18, 1934 (48 Stat. 984), and the policy of the Government thereunder for the organization and rehabilitation of Indian tribes and tribal matters. A number of the tribes have already organized and others are in the process of organizing to take a more active part in the management and control of tribal interests, including the leasing of their lands. Section 26 of the act of June 30, 1919, as amended, under which any citizen of the United States may acquire vested mining rights on unallotted Indian lands

without tribal sanction or consent, is wholly inconsistent with tribal organization and participation in the management and use of tribal property.

I invite attention to the misspelled word in line 4, page 1 of the bill; "troupe" should be "group".

The urgency of this legislation leads me to request that it be given early consideration by your committee so that it may receive final action during the present session of Congress. The Acting Director of the Bureau of the Budget advised under date of April 5, 1935, that the legislation in question would not be in conflict with the financial program of the President.

Sincerely yours,

(Sgd.) Harold L. Ickes

Secretary of the Interior

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cc - Hon. Elmer Thomas,

Chairman, Senate Committee

on Indian Affairs